WILLIAM EADIE (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF BRANTFORD (*Defendant*) ..... RESPONDENT.

1966
*Nov. 14, 15
1967
June 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Restitution—Application to sever land—Conditions including severance fee and conveyance of lands for road widening purposes complied with—By-laws respecting fee and conveyance subsequently quashed—Whether applicant entitled to recovery of money paid and property conveyed.

Certain property acquired by the plaintiff was located in a subdivision control area and could only be divided into different parcels either by the registration of an approved plan of subdivision or by obtaining permission from the appropriate Planning Board to sever the land under the provisions of *The Planning Act*, R.S.O. 1960, c. 296. An attempt to have a plan approved and registered was rejected by both the Minister and by the Brantford and Suburban Planning Board. The plaintiff later followed the alternative course and he was told what the conditions would be. These were a severance fee of $800, a strip of land to widen the road on which the property fronted, and an easement for drainage across the property.

Subsequently, he repeated his application through his solicitor and again was advised of the conditions, which were the same as before with the exception that the township also wanted a rounded corner where the aforementioned road met a highway. The plaintiff complied with these conditions. He paid the money and registered the necessary conveyances of land. The Board then gave its consent to the severance of the plaintiff's property. The plaintiff then was able to complete the sale of a house that he had built in the centre of the land.

At the time when this transaction was completed By-laws 3284 and 3306 of the defendant municipality were in force. By-law 3284 provided for a severance fee of $400 per lot. By-law 3306 provided that the land it needed for the widening of a road should be deeded by the applicant to the municipality, and at the applicant's expense. These by-laws were later quashed in separate proceedings by another party. Thereafter, the plaintiff sued to recover the $800 paid to the defendant and for damages for the value of the lands allegedly illegally taken. The judgment at trial allowed the recovery of the money and ordered the reconveyance of the land. On appeal, the Court of Appeal held that neither the money nor the property could be recovered. With leave, the plaintiff then appealed to this Court.

Held (Judson and Ritchie JJ. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Martland, Hall and Spence JJ.: The by-law by virtue of which the municipality demanded that the $800 be paid by the plaintiff to the defendant, by its words, required the plaintiff to enter into an

*PRESENT: Martland, Judson, Ritchie, Hall and Spence JJ.

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agreement to both make the payment and convey the lands in question. Such agreement could not be considered at all as if it were an ordinary case in which parties being in dispute as to their respective rights compromised them in agreement.

In so far as the sum of $800 was concerned, this was an action for the repayment of moneys paid under a mistake in law. On the basis of the exception to the general principle that money so paid cannot be recovered, outlined in *Maskell v. Horner* (1915), 84 L.J.K.B. 1752, the plaintiff was entitled to have returned to him the $800 paid under compulsion and in mutual mistake of law. A practical compulsion was alone necessary. Also, the defendant's Clerk-treasurer, who was under a duty toward the plaintiff and other taxpayers of the municipality, was not, in the circumstances, in *pari delicto* to the taxpayer who was required to make the payment.

The Planning Board, in its demand for the conveyance of the lands, was simply acting as the agent of the defendant corporation in whose favour as grantee the said conveyance was made. The matter of compulsion applied to the conveyance as well as to the payment. There was no jurisdiction in the Planning Board under subs. (4) of s. 28 of *The Planning Act,* as it then existed, and was to be found in 1960-61 (Ont.), c. 76, which would have justified the demand for such conveyance. The plaintiff was, therefore, entitled to have such conveyance expunged from the register.

Per Judson J., *dissenting*: As held by the Court of Appeal, the matter, having been dealt with by agreement, could be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. The agreement, whether authorized or not, was entered into freely by the parties, and the plaintiff, having enjoyed the fruits of his agreement, was not now entitled to recover either the money paid or the property conveyed in fulfilment thereof.

Per Ritchie J., *dissenting*: The plaintiff did not convey his land and pay $800 to the municipality with any intention of preserving a right to dispute the legality of the demand, but rather as the result of an agreement which he entered into voluntarily under the advice of a competent solicitor. The fact that the by-law which was thought to make this action necessary was later quashed made it clear that the plaintiff was acting under a mistake of law, but the accompanying circumstances were not such as to entitle him to relief.

[*Beaver Valley Developments Ltd. v. Township of York et al.* (1961), 28 D.L.R. (2d) 76; *George (Porky) Jacobs Enterprises Ltd. v. City of Regina,* [1964] S.C.R. 326; *Knutson v. Bourkes Syndicate,* [1941] S.C.R. 419; *Municipality of St. John et al. v. Fraser Brace Overseas Corpn. et al.,* [1958] S.C.R. 263; *Kiriri Cotton Co. Ltd. v. Dewani,* [1960] A.C. 192, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Reville Co.Ct.J. Appeal allowed, Judson and Ritchie JJ. dissenting.

[1] [1965] 2 O.R. 704, 51 D.L.R. (2d) 679.

Gordon F. Henderson, Q.C., and *P. A. Ballachey,* for the plaintiff, appellant.

Douglas K. Laidlaw, for the defendant, respondent.

The judgment of Martland, Hall and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario[1] which allowed an appeal from the judgment of Reville Co.Ct.J., setting aside the sum ordered and directing that judgment at trial should go dismissing the action with costs.

His Honour Judge Reville had given judgment in favour of the plaintiff (appellant in this Court) for $800 plus interest at 5 per cent from January 28, 1963, until payment. Leave to appeal to this Court was granted by the order of this Court made on December 6, 1965.

The respondent corporation had enacted By-law 3284 on March 20, 1961. That by-law was amended by By-law 3306 dated June 12, 1961. There had been in existence for some time a general subdivision by-law, No. 2377, which provided for the approval of plans of subdivision by the Brantford and Suburban Planning Board. The said By-law 3284 as amended, provided:

1. That all severances of land within the Municipality of the Township of Brantford which require the consent of the Brantford Suburban Planning Board under by-law 2377 shall be considered premature unless the owner enters into an agreement with the Municipality to pay a severance fee as hereinafter set forth;

2. The said agreement shall provide for the payment of a severance fee which severance fee will be used to provide for the resulting development of the municipality and to assist in defraying in part the expenses which otherwise would be met by the general funds of the municipality resulting from the development of such lands;

3. A severance fee of $400.00 per lot shall be charged for a lot having an area of 15,000 square feet, any smaller or larger lot shall contribute on a pro-rata basis having regard to the purpose for which it was sold and to its area and frontage;

4. The agreement shall provide that where a severance is granted on a road that requires to be widened or is planned for widening, such land as is required for widening such road shall be deeded to the municipality. The survey costs and furnishing of the deed shall be the responsibility of the owner requesting the separation. [by amending By-law 3306.]

[1] [1965] 2 O.R. 704, 51 D.L.R. (2d) 679.

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The appellant owned some 9.79 acres on the east side of a township road known as the Forced Road. These lands abutted on the south on King's Highway No. 53. When the plaintiff had purchased the lands in the year 1957 they were vacant but he subsequently erected a residence approximately in the middle of the lands. Thereafter, he decided to subdivide his lands and to this end he had a plan of subdivision prepared. This plan of subdivision showed the land upon which his house sat as being a lot with a 100-foot frontage designated as lot 6, and other lots 1 to 5 to the north of the said lot containing his home, lot 7 to the south of the lot containing his home, and lot 8 to the east of lots 1 to 7. The appellant attempted in vain to have this plan of subdivision approved by the Brantford and Suburban Planning Board under By-law 2377 but such approval was subject to certain conditions which the applicant considered unreasonable and with which he was therefore unwilling to comply. The plaintiff thereupon abandoned his plans to so subdivide his property and determined to effect a severance by selling the 100-foot lot on which the house was situate to one Woodcock. Again the appellant made an application, on this occasion not for subdivision but for severance, and again the appellant was refused such right by the municipality and the matter was referred to the Planning Board.

By letter dated March 14, 1961, the Planning Board informed the appellant:

> The following resolution was duly moved and seconded at a regularly constituted meeting of the Planning Board held on the 7th day of March, 1961: "That the Secretary be instructed to notify Mr. Eadie that a road widening strip, along his entire frontage on Forced Road, and an easement for drainage, across the property, to the satisfaction of the Township of Brantford, will be required, and that the parcel having approximately 2.4 acres and property on the east side, be combined in one deed."

In addition to that condition, the appellant was informed by the Clerk-treasurer of the Township of Brantford that his application for severance would not be approved unless he paid a severance fee of $400 per lot to the corporation. The appellant objected to this additional condition imposed by the corporation as well as to the other conditions imposed by the Planning Board with the result that this application for severance was not approved.

In the fall of 1962, the plaintiff became ill and was confined to hospital for some seven and a half months. During this time, the plaintiff's wife became apprehensive about living alone in such a secluded area. He came to the conclusion that in any event he must sell the residence and do so with expedition. The appellant, therefore, made an agreement for sale with one John P. Gibbons and his wife subject to the severance of the appellant's property being approved by the proper authorities. In the meantime, the said By-law 3284 having been enacted on March 20, 1961, and amended on June 12, 1961, by By-law 3306, the appellant submitted his application to the Municipality of the Township of Brantford. After some conferences between the appellant's solicitor and the Clerk-treasurer of the Township of Brantford, the appellant's solicitor, Mr. R. T. L. Innes, wrote to the corporation a letter dated December 5, 1962, in which he said:

> Confirming the writer's telephone conversation with your Mr. Biggar today, we will undertake to pay to the Corporation of the Township of Brantford the sum of $800.00 severance fee upon the completion of the sale from William Eadie to John Patrick Gibbons and Hilda May Gibbons of part of Blocks 1 and 2 in the Kerr Tract having a frontage of 100 feet on the easterly side of Forced Road.
>
> We have handed to Mr. Harold Marr, the secretary of the Brantford and Suburban Planning Board, a deed of a 17 foot strip on the easterly side of the Forced Road to the Corporation of the Township of Brantford for roadway widening purposes and also the deed from Mr. Eadie to Mr. and Mrs. Gibbons for approval.
>
> We would be obliged if you would request the Brantford and Suburban Planning Board to approve of these conveyances in order that we may proceed with this deal.
>
> Your very truly,
> READ & INNES
> Per: "R. T. L. Innes"

To that letter, the said Clerk-treasurer replied, by his letter of December 14th, as follows:

> Your communication of December 5th re the undertaking to pay $800 severance fee for the sale from Eadie to Gibbons is acceptable to Council.
>
> I have advised Mr. Marr of the Planning Board of the approval of Council.

The Planning Director and Secretary of the Brantford and Suburban Planning Board also wrote to the solicitor, on December 19, 1962, as follows:

> The following resolution was duly moved and seconded at a regularly constituted meeting of the Planning Board, held on the 18th day of December, 1962:

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"The Conveyance William Eadie to John Gibbons, being part of blocks 1 and 2, Kerr Tract, be approved for registration, provided a daylight corner at the junction of Highway #53 and Forced Road be included in the 17' strip of land being dedicated to the Township of Brantford."

It is to be noted that in the latter letter an additional requirement was added, *i.e.*, that he should provide for a daylight corner at the junction of Highway 53 and Forced Road. Mr. Innes sought instructions from his client who authorized submission to even this additional condition. The Brantford and Suburban Planning Board then consented to the severance and returned the copy of the deed by which the severance was to be carried out with its consent endorsed thereon. Subsequently, the solicitor wrote to the corporation enclosing the deed from the appellant to the corporation of the 17-foot strip for road widening and the land to form the daylight corner, and also remittance of the sum of $800 demanded by the corporation.

The said By-law 3284 was considered in the Supreme Court of Ontario in the action of *Noble v. Township of Brantford*[1]. By judgment dated May 22, 1963, Donnelly J. quashed the appeal. No appeal was taken from that judgment.

Thereafter, by writ issued February 24, 1963, this appellant sued to recover the sum of $800 paid to the respondent, for damages for the value of the lands allegedly illegally taken, and for costs.

The learned County Court Judge said, in his reasons for judgment:

> This raises the question of whether the severance fee of $800.00, demanded illegally as it turns out ...
>
> In addition, this action raises the further question of whether the defendant Corporation is entitled to retain the 17-foot strip of land across the whole frontage of the plaintiff's lands for road-widening purposes, and the lands for the daylight corner which were deeded by the plaintiff to the defendant in order to comply with conditions imposed by the Brantford and Suburban Planning Board.

The learned County Court Judge dealt first with the second question and concluded:

> It follows, therefore, that the conveyance by the plaintiff to the defendant, dated the 29th of November, 1962, and registered as No. A-49398 (Exhibit 9) is a nullity, and an order will be made expunging the particulars of this conveyance from the abstract in the Registry Office for the Registry Division of the County of Brant dealing with Blocks 1 and 2 of the Kerr Tract in the said Township.

[1] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

There had been, up to the date of the trial, no physical change in the lands which are the subject of such conveyance.

In his statement of claim, the plaintiff claimed relief in addition to costs of only the return of the sum of $800 with interest and damages in the sum of $2,000. The learned County Court Judge, however, as I have pointed out, gave judgment expunging the conveyance of the lands in question from the plaintiff to the defendant. I find no mention in the notice of appeal of the present respondent to the Court of Appeal of any objection to such an order on the basis that it was beyond the relief claimed, nor is there any such objection in its factum to this Court.

It, therefore, will be my course to consider this appeal as if the learned County Court Judge had the jurisdiction to make the order which he did make.

The Court of Appeal allowed the appeal of the present respondent from the judgment of the learned County Court Judge and dismissed the action upon the basis that the matter was dealt with by agreement. The Court of Appeal held that the plaintiff had agreed to both make the payment and convey the land aforesaid, and the defendant had agreed to accept such payment and conveyance in satisfaction of any terms or conditions which it might otherwise request the Board to impose whether those terms took their root in the by-law or not. Schroeder J.A., said:

> The matter may therefore be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. In that view of the case it falls squarely within the principle laid down by this Court in *Beaver Valley Developments Limited v. Township of North York and Dominion Ins. Corp.*, (1960), 23 D.L.R. (2d) 341, and affirmed by the Supreme Court in (1961), 28 D.L.R. (2d) 76.

With respect, that view fails to take into account the fact that the by-law by virtue of which the municipality demanded that the $800 be paid by the appellant to the respondent, by its words which I have recited above, required the appellant to enter into such an agreement. I am of the opinion that such agreement cannot be considered at all as if it were an ordinary case in which parties being in dispute as to their respective rights compromised them in an agreement.

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In the *Beaver Valley Developments* case, *supra,* Locke J. in this Court said at pp. 78-9:

> If it were necessary to deal with these contentions on the merits they should, in my opinion, fail, quite apart from any consideration of the amendment to s. 26 of the *Planning Act* (1955 (Ont.), c. 61) made by s. 4 (3) of c. 71 of the Statutes of 1959. The Glendale sewage disposal plant had been built by the respondent township and rates imposed upon other lands in the township which enjoyed the benefit of its use in order to pay for its construction and operation. At the time the appellant applied to the township for approval of its plan the township was under no obligation to permit the use of its sewage disposal plant by the appellant, a fact recognized by the agreement of August 19, 1954, above mentioned. The sums stipulated for in the agreement between the parties were simply contributions to be made towards the cost theretofore incurred by the township for the plant. The agreement was entered into by the appellant under legal advice and voluntarily. The contention that, in these circumstances, the moneys so to be paid were in the nature of taxes, direct or indirect, is, in my opinion, untenable.
>
> I agree with the learned trial judge that the power of the township to enter into such an agreement was undoubted. If the contrary was fairly arguable prior to the passing of the amendment of 1959, this was no longer so, in my opinion, after that was done.

I am of the opinion that the learned trial judge was correct in considering the plaintiff's action, in so far as the sum of $800 is concerned, was an action for the return of $800 paid upon the respondent's demand which was based on a by-law subsequently found to be illegal and a nullity. I am prepared to accept the submission of counsel for the respondent that this is an action for the repayment of moneys paid under a mistake in law. Counsel draws a distinction between the present case and the decision of this Court in *George (Porky) Jacobs Enterprises Ltd. v. City of Regina*[1]. There, this Court dealt with a demand for payment of licence fees. It turned out that no by-law existed by which such fees as were demanded could be exacted. It is true, therefore, that that decision is an illustration of a mutual mistake in fact. It must be pointed out, however, that the judgment of this Court therein was based upon both a mistake in fact and a payment made under the compulsion of urgent and pressing necessity. At p. 330, Hall J. gave judgment for the Court. He said:

> I am of the opinion that the payments were made under compulsion of urgent and pressing necessity and not voluntarily as claimed by the respondent. The law on this subject was aptly summarized by Lord Reading C.J. in *Maskell v. Horner* (1915), 84 L.J.K.B. 1752 at 1755.

[1] [1964] S.C.R. 326.

That decision of this Court, therefore, in so far as it dealt with the matter of payment under urgent and pressing necessity, is applicable to the present case where a by-law did exist which purported to permit the payment of such fee as was demanded by the respondent corporation but that by-law was subsequently found illegal and quashed.

It is, of course, a trite principle that money paid under a mutual mistake of law cannot be recovered. That principle, however, is subject to several well-established exceptions. I need not deal with the various exceptions in detail. The learned County Court Judge relied, *inter alia,* upon the exception that money paid to such person as a court officer under a mistake of law may be recovered. He was of the view that money was paid to the respondent corporation on the insistence of its Clerk-treasurer, whose position he equated to that of a highly-placed civil servant in a government department or an officer of the court, and it was highly inequitable, if not dishonest, for the respondent corporation to insist on the retention and that, therefore, they should be repaid. There is much to be said in support of such a view.

I prefer to base my opinion upon the exception to the general principle outlined by Lord Reading C.J. in *Maskell v. Horner*[1], who said:

> If a person with knowledge of the facts pays money which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be re-opened. If a person pays money which he is not bound to pay, under the compulsion of urgent and pressing necessity, or of seizure, actual or threatened, of his goods, he can recover it as money had and received. The money is paid, not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods, which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction... The payment is made for the purpose of averting a threatened evil, and is made, not with the intention of giving up a right, but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.

The *Maskell* case was approved by this Court in *Knutson v. Bourkes Syndicate*[2]; *Municipality of St. John et al.*

[1] (1915), 84 L.J.K.B. 1752, [1915] 3 K.B. 106.
[2] [1941] S.C.R. 419.

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v. Fraser Brace Overseas Corpn. et al.[1]; and *George (Porky) Jacobs Enterprises Ltd. v. City of Regina, supra.*

It was submitted by counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff's recovery is not so stringent and that a practical compulsion is alone necessary. In each of the three cases in this Court approving *Maskell v. Horner,* which I have cited above, there were other courses available to the plaintiffs but those other courses were time consuming and impractical. Counsel for the respondent said, in the present case, the appellant could have forced a consideration by the Brantford and Suburban Planning Board then appealed from their refusal to grant the severance to the Ontario Municipal Board. That Board, I am convinced, would have felt itself bound by the by-laws of the corporation and the best the appellant could have done was to have appealed to the Court of Appeal from their refusal to disallow or vary the order of the Brantford and Suburban Planning Board upon the point of law. It is true that this exact course was taken in *Mary Margaret Noble v. Brantford and Suburban Planning Board,* which apparently is unreported but where judgment in the Court of Appeal was delivered on February 3, 1964. Such a course, however, would, of necessity, have been so fraught with delays that the sale to Mr. and Mrs. Gibbons would have been lost. In the meantime, the appellant was languishing in hospital. It was at that very time that he had the paramount need of selling the property and establishing his wife into other habitation more suitable to their then circumstances, not months or even years later.

In *Knutson v. Bourkes Syndicate, supra,* Kerwin J., said at p. 425:

> In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a *practical* compulsion to make the payments in question and is entitled to their repayment.

The italicizing is my own.

[1] [1958] S.C.R. 263.

There is also, in support of my view, the decision of the Judicial Committee in *Kiriri Cotton Company Ltd. v. Dewani*[1], where Lord Denning said at p. 204:

> . . . if there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back . . . Likewise, if the responsibility for the mistake lies more on the one than the other—because he had misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back.

In this case, the appellant, as a taxpayer and inhabitant of the defendant corporation, was dealing with the Clerk-treasurer of the corporation and that Clerk-treasurer was under a duty toward the appellant and other taxpayers of the municipality. When that Clerk-treasurer demands payment of a sum of money on the basis of an illegal by-law despite the fact that he does not then know of its illegality, he is not in *pari delicto* to the taxpayer who is required to pay that sum.

Counsel for the respondent argued that the appellant's demand for payment here could not be based upon the illegality of the by-law as subsequently found by Donnelly J., as there was nothing in the evidence to show that the appellant even knew of the existence of the by-law. I think such a position is untenable. The appellant had been, prior to the date of this transaction, himself a member of the municipal council and would have had to know that the municipal officers act only in accordance with what they believe are their rights and duties under by-laws. The appellant was in hospital at the time of the transactions and was represented by an able solicitor who had many decades of experience in that very municipality, and who conferred frequently with the Clerk-treasurer of the municipality. It is absolutely inevitable that the existence of the by-law and its terms would have been discussed between these two persons. Moreover, the demand was made in purported exact compliance with the said by-law.

For these reasons, I am of the opinion that the appellant is entitled to have returned to him the sum of $800 paid under compulsion and in mutual mistake of law.

[1] [1960] A.C. 192.

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In my view, the Brantford and Suburban Planning Board, in its demand for the conveyance of the lands which were described in that deed, was simply acting as the agent for the respondent corporation in whose favour as grantee the said conveyance was made. All that I have said as to compulsion heretofore applies to the conveyance as well as to the payment. I am in agreement with the view of the learned County Court Judge that there was no jurisdiction in the said Planning Board under subs. (4) of s. 28 of *The Planning Act*, as it then existed, and was to be found in the Statutes of Ontario 1960-61, c. 76, which would have justified the demand for such conveyance.

I am, therefore, of the opinion that the appellant is entitled to have such conveyance expunged from the register.

In the result, I would allow the appeal with costs and restore the judgment of the learned County Court Judge. The appellant is also entitled to his costs in the Court of Appeal.

JUDSON J. (*dissenting*):—The plaintiff acquired the property in question on the road known as Forced Road in October of 1957. The area in which the land was located was designated as a subdivision control area and it could only be divided into different parcels either by the registration of an approved plan of subdivision or by obtaining permission from the appropriate Planning Board to sever the land under the provisions of *The Planning Act*. An attempt was made in the year 1958 to have a plan approved and registered. This plan was rejected both by the Minister and by the Brantford and Suburban Planning Board.

In March of 1961, the plaintiff followed the alternative course and he was told what the conditions would be. These were a severance fee of $800, a road widening strip to bring the width of the road up to 66 feet, and an easement for drainage across the property.

In December of 1962, he repeated his application through his solicitor and again was advised of the conditions, which were the same as before with the exception that the township also wanted a rounded corner where the Forced Road met the highway. These conditions were imposed and communicated to the plaintiff's solicitor by

the Brantford and Suburban Planning Board and by the Clerk of the Township of Brantford. The plaintiff complied with these conditions. He paid the money and executed and registered the necessary conveyances of land. The Board then gave its consent to the severance of the plaintiff's property. The plaintiff then was able to complete the sale of a house that he had built in the centre of the land.

The conditions imposed were not complied with under protest, nor was there any attempt made to appeal against the conditions imposed by the Planning Board.

At the time when this transaction was completed, By-laws 3284 and 3306 of the Township of Brantford were in force. They were passed on March 20, 1961, and June 12, 1961. By-law 3284 provided for a severance fee of $400 per lot. By-law 3306 provided that the land it needed for the widening of a road should be deeded by the applicant to the municipality, and at the applicant's expense.

These are the by-laws that were quashed in 1963 in the case of *Noble v. Township of Brantford*[1]. The present action was begun in February of 1964.

The judgment of the County Court Judge allowed the recovery of the money and ordered the reconveyance of the land which had been given up as a condition of the consent from the Planning Board. He held that the transfers and payment were made under effective protest and that although they had been made under mistake of law, they came within certain recognized exceptions to the rule that payments made under mistake of law are not recoverable.

I agree with the unanimous conclusion of the Court of Appeal that this money cannot be recovered nor the transfers annulled on the grounds stated by the Court of Appeal in the following passage:

> We do not find it necessary to dispose of the present case on that basis. What the plaintiff desired here was, in effect, a subdivision of his property by severance. In the ordinary course he would have been bound to apply to the Planning Board for approval of the registration of the deed of the parcel which he sought to convey. The Planning Board on due notice to the municipality would have heard it as to any terms or conditions which, in its submission, ought to be imposed. The parties did not proceed in this way. The matter was dealt with by agreement, the plaintiff having agreed to make the payment and the transfer of land aforesaid, which the defendant agreed to accept in satisfaction of any terms or conditions which it might otherwise request the Planning Board to impose, whether those terms took their root in the by-law or not. The

[1] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

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matter may therefore be regarded in the light of an application to the Planning Board submitted and disposed of by that Board as a consent application. In that view of the case it falls squarely within the principle laid down by this Court in *Beaver Valley Developments Ltd. v. Township of North York and Dominion Ins. Corp.* (1960), 23 D.L.R. (2d) 341, and affirmed by the Supreme Court of Canada in (1961), 28 D.L.R. (2d) 76. Whether the agreement between the parties was authorized or unauthorized, they entered into it freely as a means of securing the consent of the Planning Board to the severance of this particular parcel from the rest of the land, all of which was in an area of subdivision control. The plaintiff completed his transaction of sale and having thus enjoyed the fruits of his agreement with the defendant, he is not now entitled to recover either the money paid or the property conveyed in fulfilment thereof.

I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*):—I have had the benefit of reading the reasons for judgment of my brothers Judson and Spence and I agree with the former that this appeal should be dismissed with costs.

This does not appear to me to be a case to which the decision of Lord Reading in *Maskell v. Horner*[1] applies. *Maskell v. Horner* was not a case of payment under a mistake in law. In the course of his reasons for judgment Lord Reading said, at p. 118:

> As I have come to the conclusion that the plaintiff did not pay under a mistake, it becomes unnecessary to decide whether such mistake was of fact or of law. I express no opinion on the point.

It appears to me, therefore, that Lord Reading's decision is not to be treated as applying to a situation where a person has paid money voluntarily under a mistake of law but is rather to be confined, as Lord Reading indicates, to cases in which:

> The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right *but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand.*

As it appears to me, the appellant did not convey his land and pay $800 to the municipality with any intention of preserving a right to dispute the legality of the demand, but rather as the result of an agreement which he entered into voluntarily under the advice of a competent solicitor. The fact that the by-law which was thought to make this action necessary was later quashed in the case of *Noble v. Township of Brantford*[2], makes it clear that the appellant

[1] [1915] 3 K.B. 106.
[2] [1963] 2 O.R. 393, 39 D.L.R. (2d) 610.

was acting under a mistake of law, but with the greatest respect for those who hold a different view, I do not think that the accompanying circumstances are such as to entitle him to relief.

Like my brother Judson, I adopt the grounds stated by the Court of Appeal and as I have indicated, I would dismiss this appeal with costs.

Appeal allowed with costs and judgment at trial restored, JUDSON *and* RITCHIE JJ. *dissenting.*

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